Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

PETITIONER,

V.

TIMOTHY JOHN YELDER,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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35pp

QUESTIONS PRESENTED

1. May an appellate court reverse a trial court's decisions overruling objections under Batson v. Kentucky, 476 U.S. 79 (1986), to the exercise of peremptory strikes under the applicable "clearly erroneous" standard based upon a conclusion from isolated portions of the voir dire transcript that one but not all of a prosecutor's stated reasons for two of those strikes was not credible?

2. May an appellate court reverse a trial court's decisions overruling objections under Batson v. Kentucky to the exercise of peremptory strikes under the applicable "clearly erroneous" standard based upon a view that some (but not all) of the racially neutral reasons for some of the strikes were inherently suspect or otherwise not legitimate?

THE PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The opinion of the Court of Criminal Appeals of Alabama affirming the Respondent's convictions and the decision of that court denying rehearing are not yet reported and are reproduced at pages 17-79 of the appendix hereto.

2. The opinion of the Supreme Court of Alabama reversing the Respondent's convictions and the decision of that court denying rehearing are not yet reported and are reproduced at pages 1-16 and 80-81 of the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Alabama which is sought to be reviewed was entered on August 14, 1992. The order of the Supreme Court of Alabama denying rehearing was entered on October 8, 1993, and this petition is filed within ninety days of said date.

This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

> No state shall ... deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. Amend. XIV, §1

STATEMENT OF THE CASE

The Respondent, Timothy John Yelder, was charged with three counts of first degree rape, one court of first degree burglary, two counts of second degree burglary, and one count of first degree sodomy. These charges were consolidated for trial, and Yelder was found guilty on all counts. (R. 1137-1138, 1179-1205, 1251) Yelder was sentenced to life in prison on each count of rape, 40 years' imprisonment for the sodomy conviction, 20 years' imprisonment on each second degree burglary conviction, and 30 years'

imprisonment for the first degree burglary conviction. (R. 1152-1156)

Each of the three victims' faces was covered during the attack, and none of the victims could identify Yelder. Thus, DNA evidence connecting Yelder with each of the rapes was critical to the State's case. (Appendix B, pp. 20 and 68; R. 240-241, 244-245, 250, 295-296, 299, 303-304, 370, 378-380) The prosecutors' desire to eliminate veniremembers with communication and comprehension difficulties, due to the complex testimony regarding new scientific test procedures and volumes of technical test data that would be presented, was reflected in the questions the prosecutors submitted for the trial judge to ask the venire on voir dire. (R. 1271-1291) About 15 witnesses testified at trial concerning the taking, transporting, preservation and testing of numerous blood samples, the theory and method of DNA fingerprinting,

and population genetics statistical theories and conclusions. (R. 463-700, 712-1042) This testimony consumed most of the trial and involved numerous exhibits, including a slide presentation on DNA fingerprinting and the use of terms such as immunogenetics and histocompatibility (R. 613), cytogenetics (R. 828), electrophoresis (R. 842), restriction enzyme (R. 935), cross-contamination (R. 937), and Hardy-Weinberg equilibrium theory (R. 1022). The State's voir dire questions included ones directed to the ability to listen with great attention and to follow testimony of an advanced scientific nature (R. 1279-1280, 1287-1288), and others directed to veniremembers with vision problems who had not had their eyes examined in two years or who would be limited in the ability to read and examine charts a distance away or documents with fine print. (R. 1280, 1288)

Another question requested by the State asked whether any veniremembers felt uncomfortable judging another person, indicating that some people take the Bible admonition "Judge not, that ye be judged" literally. (R. 1280-1281, 1289)

There was an extensive voir dire examination of potential jurors. (R. 6-184) After some preliminary questions, the trial judge made this inquiry:

> [H]ave any of you seen anything in the newspapers.... Anybody seen anything in the newspapers, seen anything on the television, or listened to anything on the radio about these charges involving these allegations -- alleged rapes, alleged burglaries, back last spring out in the Brandywine, Woodmere area? Everyone that has seen anything, heard anything or discussed this case, heard it discussed, have any knowledge at all through the media, through discussing it with friends, any other way at all, have any knowledge about the cases involving Timothy Yelder, please raise your hands.

(R. 12-13) After every juror who had responded was taken to another room, the trial judge asked the remaining veniremembers, "Y'all haven't heard anything or seen anything on the T.V.?" (R. 13-14) The following then occurred:

> BY A JUROR: I have a question. My question is, does that mean did you read the paper, did you see this in the paper? Is that what you're saying?
>
> BY THE COURT: No, what I'm asking you, do you know anything about this case whether you got it from the media or whether you got it from anywhere else?
>
> BY A JUROR: My answer to that is no.
>
> BY THE COURT: All right, if you have read anything, seen anything, heard anybody discussed, talk about the charges of Timothy Yelder for rape, about a series of rapes that took place out in the Brandywine area back in the spring of 1988, last spring, I want to know. If you have heard anything --.
>
> BY A JUROR: Yes, excuse me, I have read about it.

BY THE COURT: All right, let her go down to the jury assembly room. I don't know how I can say that much stronger.

BY A JUROR: I saw the headlines in the papers but I didn't really read about it.

BY THE COURT: All right, you go down to the jury room with the rest of them, we'll call you back in a minute.

BY A JUROR: What if during the course of the information that you realize that you have heard it?

BY THE COURT: Maybe you better go down there with them, too.

All right, that was a lot of publicity about a fellow that was charged with doing some raping out in this area last spring, and if you know anything about it, anything at all, newspaper-wise, talking about it, conversation-wise or otherwise, that's what we want to know.

BY A JUROR: I recognize the name because I read the headlines as well.

(R. 14-16)

The record also reflects that the following occurred during the trial judge's questioning of veniremember 75 (Ennis McCorvey):

> Q: What this is about Mr. McCorvey, when somebody has seen something in the paper or knows something about a case, we have to be real careful about it, that's why we are doing it this way. What is it you saw or read or heard or know about this case?
>
> A: I don't know nothing but what I saw in the papers.
>
> BY MS. BROOKS [a prosecutor]: Excuse me, Your Honor, I didn't hear him.
>
> BY THE COURT: He knows nothing except what he saw in the papers?
>
> A: I don't even know anything about it.
>
> BY THE COURT: He don't know the gentleman.
>
> Q: Let me ask you this, this is real important: would anything you saw in the paper or know about this case, would any of that cause you to have an opinion, a fixed opinion as to whether or not this man here is guilty or whether he is not

guilty of this case, of this charge?

A: I have no knowledge of it.

(R. 88)

The record reflects that veniremember 132 (Christine Dunn) gave the following response when individually asked what she knew or had read or saw about the case: "Oh, I had been reading about the case, I had been keeping up with it in the newspaper." (R. 112-113) She then gave yes or no responses to a series of follow-up questions. (R. 113-114)

After the trial judge inquired whether any veniremember knew or had read anything about DNA, he had the 26 jurors who had identify themselves. (R. 176-178) After he began his next question, veniremember 72 (Johnnie Means) interrupted to respond to the preceding question. (R. 178)

The State moved to strike a veniremember for cause who had responded

that he would have problems concentrating on the case. The trial judge denied this motion but then suggested removing this individual by agreement to make the strikes even. Defense counsel objected, stating "You've already let three or four of our blacks go," referring to the excusal of mothers who could not be sequestered. The trial judge then forcefully admonished defense counsel that the case would not be tried on the basis of race and that race had been irrelevant to the excusal of jurors. (R. 186-188)

Before the jury was sworn, defense counsel objected to the jury as constituted "under the authority of Batson vs. Kentucky." (R. 194, 228) In support of this objection, defense counsel stated that Yelder is black, that the State had 32 strikes and had struck 24 blacks, and that, in his opinion, the prosecution team had exercised peremptory challenges to exclude

members of Yelder's race. (R. 194) In response, one of the prosecutors pointed out that two members of the jury were black individuals. (R. 197) The trial judge asked the prosecutors to state their reasons for striking the black jurors in question, expressly not ruling whether a prima facie case had been established. (R. 198, 200)

A summary of some, but not all, of the reasons given for the prosecutors' strikes of black veniremembers is contained in the opinion of the Court of Criminal Appeals. (Appendix B, pp. 38-42)

Prosecutor Bruce Maddox stated a combination of reasons for striking veniremember 151 (Catherine Jackson). She was not on the original juror list so the prosecution did not have as much information on her as it normally had and they had had to do some very quick research, which had revealed convictions

for theft by fraud and for receiving stolen property for an individual with the same name and apparent age. Ms. Jackson had responded that she knew Mr. Wagstaff. Both Mr. Maddox and other prosecutors had noticed her mumbling a great deal to no one in particular during voir dire. He thought her actions indicated hostility to the situation. Mr. Maddox concluded, based on experience and the totality of these circumstances, that Ms. Jackson would not be a good juror for the State, and that the State could not take a chance on her since it had not had the time and information available on her it normally had. (R. 214-215)

Mr. Maddox also stated a combination of reasons for striking veniremember 72 (Johnnie Means). She had sat right in front of him on the front row and he saw her responses very well, including nodding very vigorously when the judge said the

"Judge not, that ye be judged" quote. Ms. Means also had some question about her eyesight in response to the State's question about that. With respect to a couple of questions the State had requested, Ms. Means did not respond when the judge went row by row for responses and had not responded until the judge was about to go on the next question. Her response time was very slow, and Mr. Maddox feared that she would not be favorable to the prosecution and might not be able to deal with the multitude of new scientific information the State would present. Additionally, Mr. Maddox was a little worried by a "We care" pin Ms. Means was wearing of which he did not know the meaning. (R. 217-218)

Mr. Maddox also stated a combination of reasons for striking veniremember 132 (Christine Dunn). She had seemed to have some difficulty in the voir dire before the

court in understanding what the court was saying to her about what she may have heard about the case, and her responses were such, both from articulation and the way she put sentences together, that Mr. Maddox could not understand what she said. Mr. Maddox was concerned about both her ability to perceive what was said and her ability to communicate, particularly on the complicated scientific evidence in the case. He was afraid she could not meaningfully discuss the case with fellow jurors. In addition, she had a record of traffic cases, but this was not of great concern. However, she showed an extreme disinterest in what was going on and Mr. Maddox thought she either would not listen to the evidence or would not be able to understand. She was chewing gum while trying to talk to the court. Mr. Maddox did not believe she would be able to give

the case the attention and consideration it deserved. (R. 222)

Mr. Maddox also gave a combination of reasons for striking veniremember 75 (Ennis McCorvey). Mr. McCorvey was 69 years old and an instance where, due to age or some physical condition, a veniremember had difficulty carrying himself, listening to the court, and responding. He was very hesitant in answering or had difficulty in understanding and speaking. Mr. Maddox did not believe Mr. McCorvey could give the attention to the case that it deserved, and some of the other prosecutors felt he might have a hearing problem. (R. 225-226)

Mr. Maddox struck every veniremember, both black an white, who admitted to hearing problems and everyone who wore glasses and had not had an eye examination in two years, except for one individual (#84, Mr. Byrd) who was struck by the defense. (R. 146, 147, 206, 217, 220,

223-225, 1292) He also struck white veniremembers who were old and frail or who for any reason exhibited a slowness to understand or other potential difficulty understanding the complex scientific evidence the State would present. (R. 220, 223-224, 227) He struck a white female whose husband was a counselor because he felt that counselors are not disposed to punish people and another white female whose husband had been a minister because he felt her strong religious feelings might mitigate against the State. (R. 227-228) The State's last four strikes were of white individuals. (R. 226-227)

The trial judge decided that Mr. Maddox's stated reasons for all the strikes of black persons were racially neutral, and he overruled the defense objection. (R. 228) After Yelder was convicted, a motion for new trial included allegations that the trial court had erred in its application of

Batson v. Kentucky and that the State's strikes indicated a violation of a defendant's constitutional rights as set forth in Batson v. Kentucky. (R. 1337)

At the hearing on the motion for new trial, defense counsel alleged that the prosecutor's stated reasons were pretextual. (Supp. R. III. 6-10) Prosecutor Ellen Brooks responded that the prosecution had struck every individual they were aware of to whom the reasons that had been stated for striking black individuals applied, e.g., chewing gum, appearing elderly or hard of hearing, or having a slow response time. (Supp. R. III. 12) She emphasized that the prosecution had known it would be a long trial with complicated evidence and that the State was very concerned to eliminate those who were physically or mentally unable to listen and comprehend as well as to endure the physical difficulties of a

long, difficult, and emotional trial. (Supp. R. III. 12-13) She also identified each actual juror by number and for each stated that the prosecution notes had not indicated any serious criminal convictions or any difficulty in concentrating or understanding. Three white and one black juror had minor traffic infractions; these were left after the prosecution struck all of those with more serious convictions early on. (Supp. R. III. 47-48)

The trial court overruled the motion for new trial, without opinion. (R. 1352) On appeal, Yelder argued that the trial court had erred in denying his Batson motion and that the prosecutors' reasons for strikes of black jurors were not race neutral. (Appendix B, pp. 35-36) The Court of Criminal Appeals proceeded directly to

evaluating the race-neutrality of those reasons.[1] (Appendix B, pp. 37-46)

The Court of Criminal Appeals concluded that the strikes of black veniremembers were race-neutral. (Appendix B, pp. 42-43) It declined to reverse the trial court's decision on the ultimate question of discriminatory intent, noting that an appellate court could only reverse a trial court's factual finding that challenges were not racially motivated if that finding was clearly erroneous, and relying, in part, on this Court's decision

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[1]In so doing, it mistakenly identified Mr. Wagstaff as an individual involved in victim's rights. (Appendix B, p. 39) Mr. Wagstaff had been a controversial person in public service who had made claims that had put him in the news, and Mr. Maddox had reason to believe that he was present at trial on behalf of the defense. Mr. Maddox struck all three individuals (two black and one white) who said they knew Mr. Wagstaff. (R. 142, 210, 214, 215, 224-225)

in Hernandez v. New York. (Appendix B, p. 47-49) The State applied for rehearing with respect to the misidentification of Mr. Wagstaff. Yelder also applied for rehearing. Both rehearing applications were overruled without opinion on November 15, 1991. (Appendix B, p. 78)

The Alabama Supreme Court granted Yelder's petition for a writ of certiorari to determine whether the prosecution's use of peremptory strikes violated the principles it had set forth in Ex parte Branch, 526 So.2d 609 (Ala. 1987), and Ex parte Bird, 594 So.2d 676 (Ala. 1991).[2]

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[2] In Branch and Bird, the Alabama Supreme Court set forth its understanding of this Court's decision in Batson v. Kentucky, the procedures it believed necessary to implement the Batson decision, and the scope of appellate review of trial courts' decisions on Batson motions. See Branch, 526 So.2d at 616; and Bird, 594 So.2d at 679-685.

(Appendix A, p. 1-2) In its August 14, 1992, decision in Yelder's case, it gave a summary of some, but not all, of the prosecutors' reasons for striking veniremembers 72, 75, 132, and 151. It then stated, following its decision in Bird, that a strong statistical result of strikes case raises a strong inference of discrimination which requires stronger explanations by the State in rebuttal. (Appendix A, pp. 3-7)

The court then labelled various reasons, e.g., same name as an individual prosecuted, body language, and communication difficulty, as "whimsical, ad hoc excuses." Next, the court quoted (with some inaccuracy) two isolated portions of the voir dire transcript where veniremembers 75 and 132 were questioned. Finally, the court stated that the State's allegation of communication deficiencies on the part of these veniremembers was refuted

by said record. On this basis, the court concluded that the State's explanations for its challenges of these veniremembers were a pretext for racial discrimination, and it reversed Yelder's convictions. (Appendix A, pp. 7-8)

The State applied for rehearing, arguing the issues presented in the instant petition. Rehearing was denied by the Alabama Supreme Court on October 8, 1993, without opinion. (Appendix C)

ARGUMENT

THE WRIT SHOULD BE GRANTED DUE TO CONFLICT WITH THE CONTROLLING DECISIONS OF THIS COURT IN BATSON v. KENTUCKY, 476 U.S. 79 (1986), AND HERNANDEZ v. NEW YORK, 111 S.CT. 1859 (1991), AND WITH DECISIONS OF COURTS OF APPEALS.

In Batson v. Kentucky, 476 U.S. 79 (1986), this Court indicated that a prosecutor may not strike potential jurors solely on account of their race or on the

assumption that black jurors as a group are unfit, but that peremptory challenges may be exercised for any other reason related to the prosecutor's view concerning the outcome of the case. Batson, 476 U.S. at 89 and 98. The Court also emphasized that when a prosecutor is required to give an explanation for a strike of a black person, that explanation need not rise to the level justifying a challenge for cause. Batson, 476 U.S. at 97. This Court further stated that a trial court's determination whether there had been intentional discrimination is a finding of fact that largely turns on an evaluation of credibility and, thus, is entitled to great deference by a reviewing court. Batson, 476 U.S. at 98 n.21.

This Court further expounded on evaluation of the race-neutrality of an attorney's explanation of a strike and the standard of review of trial courts' decisions in Hernandez v. New York, 111

S.Ct. 1859 (1991). With regard to the former, this Court stated that a court must "determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." The Court cautioned that proof of racially discriminatory intent is required to show a violation of the Equal Protection Clause, and that racially disproportionate impact alone does not suffice. The Court held that a neutral explanation means an explanation based on something other than the race of the juror. "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Hernandez, 111 S.Ct. at 1866.

This Court also indicated in Hernandez that a prosecutor's decision to strike a

potential juror could be due to a consideration of multiple factors, that in such a case all of those factors must be considered collectively in determining the race-neutrality of the explanation, and that a doubt related to communication abilities based upon an individual's conduct during voir dire is a race-neutral explanation for a strike. In Hernandez, this Court held a prosecutor's explanation that he struck two Spanish speaking jurors because their responses and demeanor during voir dire caused him to doubt their ability to defer to the official translation of Spanish-language testimony to be race-neutral. It refused to consider the correlation between ethnicity and Spanish-language ability in determining the race-neutrality question because the prosecutor had not relied solely on this language ability. Hernandez, 111 S.Ct. at 1866-1867.

With regard to appellate review of a trial court's decision on the ultimate question whether the defendant established purposeful discrimination, this Court held that the trial court's decision could not be overturned unless it was "clearly erroneous." Hernandez, 111 S.Ct. at 1871. The Court's analysis of the standard of review issue began with reference to its declaration in Batson that the trial court's decision represents a finding of fact to be accorded great deference. Hernandez, 111 S.Ct. at 1868-1869. The Court made the following comment in this regard:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding will "largely turn on evaluation of credibility." 476 U.S., at 98, n.21, 106 S.Ct., at 1724, n.21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for

> a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." Wainwright v. Witt, 469 U.S. 412, 428, 105 S.Ct. 844, 854, 83 L.Ed.2d 841 (1985), citing Patton v. Yount, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847 (1984).

Hernandez, 111 S.Ct. at 1869. This Court also stated with regard to a trial court's credibility determination that "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." Hernandez, 111 S.Ct. at 1870.

This Court indicated in Hernandez that a trial court's decision cannot be deemed clearly erroneous where there are two

permissible views of the evidence pertaining to the determination of the prosecutor's sincerity. It noted several factors on which a trial court could validly rely in crediting a prosecutor's explanation. The first such factor is the prosecutor's demeanor, which this Court noted is a matter which an appellate court has no opportunity to review. Hernandez, 111 S.Ct. at 1871-1872.

The decision and opinion of the Alabama Supreme Court in the case at hand is obviously in direct and irreconcilable conflict with this Court's controlling decisions in Batson v. Kentucky and Hernandez v. New York, which decisions the Alabama Supreme Court chose to ignore.

In the first place, the Alabama Supreme Court did not apply the applicable "clearly erroneous" standard of review nor defer in any way to the trial court's judgment on the ultimate question of

discriminatory intent. Instead, it substituted its judgment for that of the trial court as to the sincerity of the prosecutor's explanation that he struck veniremembers 75 and 132 due, in part, to his perception that these individuals had difficulties in understanding and speaking. It made this substitution of judgment based upon a de novo evaluation of two isolated portions of the voir dire transcript. In the Alabama Supreme Court's view, the prosecutor's explanation of "communication difficulties" with regard to these two veniremembers was refuted by those portions of the record and, therefore, this explanation was a pretext for racial discrimination. (Appendix A, pp. 8-13)

The Alabama Supreme Court's opinion that review of a written record can accurately convey the communication abilities of jurors is patently erroneous.

See United States v. Changco, 1 F.3d 837, 841 (9th Cir. 1993). Characteristics such as unusual pauses between words or sentences or when responding to questions, enunciation, voice inflections and facial expressions are not reflected in a written record. They are obvious, however, to all present at trial, including the trial judge, who is the proper fact-finder. The Alabama Supreme Court ignored both this simple and well-recognized fact about review of written records as well as this Court's repeated admonitions in Hernandez as to the importance of the trial court's evaluation of a prosecutor's demeanor as bearing on the prosecutor's sincerity. Hernandez, 111 S.Ct. at 1869 and 1872.

The portions of the transcript on which the Alabama Supreme Court relied were not even brought to the attention of the trial court. Thus, the prosecutor had no opportunity to respond to the view that

these transcript excerpts indicate pretext, nor did the trial court have any opportunity to consider and address this matter. See United States v. Changco, 1 F.3d at 841-842.

If this were not bad enough, a careful reading of the actual transcript excerpt regarding veniremember 75 to which the Alabama Supreme Court referred actually supports the prosecutor's allegation of communication difficulties rather than refuting it.[3] A prosecutor interrupted immediately after this juror's first response and said she did not hear the juror. The trial judge apparently was not confident that he had heard the juror correctly, since there is a question mark at the end of his recitation of the juror's

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[3]The transcript excerpt in question is set forth fully at pages 8-9, supra.

response in reply to the prosecutor's statement. (The question mark is not in the Alabama Supreme Court's opinion but is in the transcript.) The juror then spontaneously changed his first response, which suggests some confusion on his part. The trial judge then again attempted to translate this second statement by the juror, but the judge's statement of what he thought the juror had just said is at variance with the court reporter's version of that statement. The juror's answer to the trial judge's next question was not responsive to the question asked.

The transcript similarly reveals with respect to veniremember 132 that, when asked what she knew about the case or had read or seen about it, she did not respond appropriately with a factual account but instead merely stated that she had been reading about the case in the newspaper. (R. 112-113)

The Alabama Supreme Court also ignored the fact that five veniremembers who are not identified in the transcript had unusual difficulty understanding the trial judge's initial inquiry about pretrial publicity. The pertinent transcript excerpt is set forth at pages 5-7, supra. The identity of these five veniremembers was known to the attorneys and the trial judge, but not to the Alabama Supreme Court.

The record also directly supports the prosecutor's allegation of slow responses by veniremember 72. (R. 176-179) It also reveals that the prosecutor struck three white jurors because of similar doubts about communication difficulties or confusion in answers. (R. 220, 223-224, 227) It additionally demonstrates that the State's last four strikes were of white individuals and that there were two black individuals on the jury. See United States v. Terrazas-Carrasco, 861 F.2d 93, 95 (5th

Cir. 1988); and United States v. Lane, 866 F.2d 103, 106 (4th Cir. 1989). None of these facts were even mentioned by the Alabama Supreme Court. That court undoubtedly did not use the applicable "clearly erroneous" standard in reviewing the trial court's decision in this case.

The Alabama Supreme Court's decision also conflicts with this Court's decision in Hernandez as to the proper evaluation of the race-neutrality of an attorney's explanation for a strike. The court did not even consider whether the reasons proffered violated the Equal Protection Clause as a matter of law, i.e., whether the reasons were facially valid or whether, instead, a discriminatory intent was inherent in those explanations. Hernandez, 111 S.Ct. at 1866. Rather, the court indicated that stronger reasons are required whenever the statistical evidence of discriminatory impact in the particular

case is strong, and it stated that reasons such as demeanor and communication difficulty are "whimsical, ad hoc excuses" which should be rejected. (Appendix A, pp. 7-8)

In Hernandez, this Court expressly approved as legitimate, race-neutral reasons the very same type of explanations for strikes which the Alabama Supreme Court denigrated and rejected in reversing the trial court's decision in this case. Reasons such as communication abilities or an adverse demeanor are inherently racially neutral. As this Court's opinion in Hernandez makes clear, whether such explanations are credible is an entirely different matter from whether they are race-neutral, but the credibility of such or any other explanation is for the trial court to determine, and that determination may not be overturned unless it is clearly erroneous. In the Alabama Supreme Court's

conflicting opinion, however, such explanations are inherently suspicious and may simply be rejected by an appellate court, at least where the appellate court views the "statistics" in the case to be bad.[4]

The Alabama Supreme Court's decision in this case also conflicts with this Court's decision in Hernandez in reversing

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[4]The court's view that such reasons are inherently suspect is apparent from the court's reference to its decision in Ex parte Bird. See Ex parte Bird, 594 So.2d at 685. The court's view that the communication difficulty reason was a "whimsical, ad hoc excuse" in the instant case certainly is contradicted by the record, as related at pages 3-4, 9-10, and 16-18, supra. Also, this Court held in Batson and Hernandez that an attorney may strike a prospective juror for any reason connected with the attorney's view of the outcome of the case other than race. See also United States v. Bentley-Smith, 2 F.3d 1368, 1373-1375 (5th Cir. 1993)(regarding the "shifting burden" framework in Batson being one of production rather than persuasion and regarding review of challenges based on intuitive judgments).

the Respondent's convictions based upon the singling out and rejection of only one of multiple reasons given by the prosecutor for each of the strikes in question.[5]

Veniremember 72 was struck not only due to slow responses during voir dire but also due to concerns about her eyesight. Every veniremember who responded to the eyesight question was struck by the State except one individual who was struck by the defense, and this reason bore a specific relationship to the case given the voluminous documents and the slide presentation involved. This veniremember

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[5]It appears that the court reversed the convictions solely due to its rejection of the "communication difficulty" explanation for the strikes of veniremembers 75 and 132, but it also summarized some of the prosecutors' reasons for striking veniremembers 72 and 151. (Appendix A, pp. 3-5) Therefore, the State will address the additional reasons for striking all four of these veniremembers.

also had nodded vigorously when the trial judge stated the Bible quote "Judge not, that you be not judged", which clearly would be a legitimate concern to any prosecutor. Also, as previously noted, the record affirmatively supports the prosecutor's explanation of a slow response time by this veniremember. See United States v. Bentley-Smith, 2 F.3d at 1375.

The prosecutor explained that he struck veniremember 132 not only due to a perceived difficulty in understanding the trial judge and the prosecutor's inability to understand this individual, but also because this veniremember had shown an extreme disinterest in what was going on during voir dire and had been chewing gum while trying to talk to the trial judge. These also are facially neutral explanations, and they are reasons which intrinsically must be evaluated by the trial judge since he observed what actually

occurred. See United States v. Terrazas-Carrasco, 861 F.2d at 94-95; United States v. Lance, 853 F.2d 1177-1181 (5th Cir. 1988); United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987), cert. denied, 484 U.S. 928 (1987); United States v. Davis, 871 F.2d 71, 72-73 (8th Cir. 1989); and United States v. Changco, 1 F.3d at 840.

The prosecutor was not only concerned about veniremember 75's ability to understand and speak, but also about this individual's physical condition due to age or other infirmity. Some of the other prosecutors also had felt that this veniremember had an unacknowledged hearing impairment. See United States v. Moreno, 878 F.2d 817, 821 (5th Cir. 1989). The prosecutor struck two white veniremembers due to similar concerns about those individuals' condition due to age. (R. 220, 223-224) He also struck the two veniremembers (one white and one black) who

admitted to hearing problems. (R. 146, 206, 223-224)

A number of obviously race-neutral reasons also were articulated for striking veniremember 151. This juror was not on the original juror list and the prosecutor was reluctant to leave someone on the jury that he had not been able to adequately investigate. His quick research had revealed that an individual with the same name and age had two criminal convictions. See United States v. Tindle, 860 F.2d 125, 129 (4th Cir. 1988), cert. denied, 490 U.S. 1114 (1989); and United States v. Terrazas-Carrasco, 861 F.2d at 95 n.1. This juror also had acknowledged knowing Mr. Wagstaff, and the prosecutor had struck all three individuals (two black and one white) who acknowledged knowing this public figure who apparently was present on behalf of the defense. Cf. United States v. Moreno, 878 F.2d at 821. In addition, all of the

prosecutors had noticed this juror mumbling a great deal to no one in particular during voir dire in a manner that indicated hostility to the situation. See United States v. Terrazas-Carrasco, 861 F.2d at 94-95; United States v. Lance, 853 F.2d at 1181; United States v. Vaccaro, 816 F.2d at 457; Barfield v. Orange County, 911 F.2d 644, 648 (11th Cir. 1990), cert. denied, 111 S.Ct. 2263 (1991); and United States v. Forbes, 816 F.2d 1006, 1010-1011 (5th Cir. 1987).

The multiple factors considered by the prosecutor in Hernandez were related to each other rather than being more discrete multiple reasons for the challenged strikes. However, there is no more grounds for singling out just one of a number of reasons for a strike than there is for singling out a factor that contributed to a lone reason for a strike. The Alabama Supreme Court's decision conflicts with

this Court's opinion in Hernandez by reversing convictions due to rejection of a single reason for certain strikes when that reason was not the sole reason for those strikes. Its decision also conflicts with opinions of courts of appeals regarding the evaluation of multiple reasons for strikes. See, e.g., United States v. Lance, 853 F.2d at 1181; United States v. Davis, 871 F.2d at 72-73; United States v. Lane, 866 F.2d at 106; and United States v. Lewis, 837 F.2d 415, 417 n.5 (9th Cir. 1988).

This case requires review by this Court. The Alabama Supreme Court's opinion is, on its face, in direct conflict with the controlling decisions of this Court. As a decision of the highest court of the State of Alabama, however, it will be used as a guide by the lower courts in this state.

The decision also is not an aberration in this state. The Alabama Supreme Court chose to ignore Hernandez and, instead, to follow its earlier, post-Hernandez decision in Ex parte Bird, 594 So.2d 676 (Ala. 1991). Other post-Hernandez cases in which Alabama courts have egregiously erred in the interpretation of this Court's dictates include Roger v. State, 593 So.2d 141 (Ala.Crim.App. 1991)(held, a prima facie case was established because the trial judge failed to inquire and accepted the explanation that two of those stricken had responded on voir dire that they did not want to serve, and the fact that a juror does not want to be on the jury is not a sufficient reason to strike the juror), cert. denied (Ala. 1992); Guthrie v. State, 598 So.2d 1013, 1019-1020 (Ala.Crim.App. 1991)(rejected prosecutor's explanation that he had struck five individuals because they were relatives of individuals

prosecuted by the district attorney's office because the prosecutor did not confirm these relationships on the record during voir dire and one juror later denied the relationship); Bush v. State, 615 So.2d 137, 139-140 (Ala.Crim.App. 1992)(rejected prosecutor's explanation that he had struck two individuals due to their relationship with people involved in criminal activity because the prosecutor had not asked the jurors about this on voir dire and the record contained no other proof that the prosecutor's allegation was true), cert. denied (Ala. 1993); and Walker v. State, 611 So.2d 1133, 1139-1143 (Ala.Crim.App. 1992)(the truth of virtually any reason proffered by the prosecutor must be verified by voir dire examination of the veniremember, including the actual existence of any suspected biases), cert. denied (Ala. 1993).

Even cases in which a trial court's decision overruling a Batson objection has been upheld exhibit an erroneous understanding of the process of evaluating Batson issues and/or the appropriate standard of appellate review. See, e.g., Bell v. Lowery, 619 So.2d 1380, 1382 (Ala. 1993)(indicating that a prosecutor's explanations must be sufficiently strong to overcome a presumption of bias); McGee v. State, 594 So.2d 219, 222 (Ala.Crim.App. 1991)(rejecting reasons which are not affirmatively verified by the record and accepting a reason only because the prosecutor struck both black and white persons for that reason), cert. denied (Ala. 1992); Christianson v. State, 601 So.2d 512, 516 (Ala.Crim.App. 1992)(indicating that the State's reasons are to be subjected to exacting scrutiny on appeal where the appellant made a strong prima facie showing); Hart v. State, 612

So.2d 520, 524 (Ala.Crim.App. 1992)(reason upheld as race neutral only because the record established that the reason also was applied to white veniremembers), aff'd, 612 So.2d 536 (Ala. 1992); Granville v. State, 624 So.2d 671, 674 (Ala.Crim.App. 1992)(any reasons based even partially on subjective judgments are suspect), cert. denied (Ala. 1993); and Powell v. State, 608 So.2d 411, 413 (Ala.Crim.App. 1992)(rejecting nursing profession as not race-neutral reason because the juror was not questioned on voir dire as to whether she actually was a sympathetic person), cert. denied (Ala. 1992).

The Alabama Supreme Court's sensitivity to racial issues and its desire to eradicate racial prejudice in the jury selection process is laudable. However, the court obviously is mistaken in thinking that it is correctly following this Court's precepts and the requirements of the United

States Constitution. It stands in need of correction and of further guidance by this Court.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari to the Alabama Supreme Court should be granted.

Respectfully submitted,

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